

1. Before

James C. Peck, Jr.
Arbitrator

In the Matter of Arbitration Between:

**FRATERNAL ORDER OF POLICE,
LODGE NO. 5**

V.

**AAA Case No. 01-16-0005-2242
P/O William E. Branish (Terminated)**

THE CITY OF PHILADELPHIA

**Hearing Date: May 24, 2017
Decision Date: July 14, 2017**

Appearances:

For the Union - Marc L. Gelman, Esq., Jennings & Sigmond, P.C.

For the City of Philadelphia - Christopher H. Rider, Esq., City of Philadelphia, Law
Department

Procedural Background

This arbitration was conducted pursuant to a collective bargaining agreement between the City of Philadelphia, Pennsylvania and Fraternal Order of Police Lodge, No. 5, which is the recognized exclusive collective bargaining representative for a unit of police officers employed by the City of Philadelphia.

The City of Philadelphia and FOP Lodge 5 are parties to a collective bargaining agreement with a term of July 1, 2014 through June 30, 2017. This agreement contains, among other things, a Grievance-Arbitration procedure (Article XXI) culminating in final and binding arbitration under the auspices of the American Arbitration Association.

The instant matter arises from a grievance filed by the Union on September 20, 2016 on behalf of terminated Police Officer William E. Branish, alleging that Officer Branish was terminated without just cause.¹ Officer Branish received a 30-day suspension with Notice of Intent to Dismiss² on September 19, 2016. This Notice of Intent to Dismiss alleged that Branish had engaged in Conduct Unbecoming of an Officer, Section 1-026010, specifically, *“engaging in any action that constitutes the commission of a felony or misdemeanor which carries a potential sentence of more than a year.”*

This grievance was subsequently denied by the City. When the issues of this dispute could not be resolved under the terms of the contractual grievance-arbitration procedure, the underlying grievance was referred to the American Arbitration Association for selection of a neutral arbitrator. Subsequently, by letter dated December 27, 2016, the undersigned was appointed arbitrator in this matter.

Pursuant to a Notice of Hearing which issued on May 5, 2017, an evidentiary hearing was conducted on May 24, 2017, at the offices of the American Arbitration Association, 230 South Broad Street, 12th Floor, Philadelphia, PA 19103. Both parties were represented by counsel, and at hearing were afforded the opportunity to examine and cross-examine witnesses, and to introduce relevant exhibits. The Grievant, former Police Officer William E. Branish, was present and participated fully in the proceeding. Both parties made oral arguments on the record. A Court Stenographer was present and made a verbatim transcript of the proceeding.

¹ See **Joint Exhibit 2**, received into evidence.

² See **Exhibit C-2**, received into evidence.

Issue

Did the City of Philadelphia violate the express terms of the collective bargaining agreement by discharging Police Officer William E. Branish without just cause? If the City is found to have violated the terms of the collective bargaining agreement, what is the appropriate remedy?

Facts

The City's Case:

As this is a discharge case, the City of Philadelphia had the burden of proof, and was first to present its witnesses at the Hearing.

Internal Affairs Sgt. Francis Erickson, was the next officer on the call rotation on January 5, 2016, when he received an intriguing phone call. According to Sgt. Erickson, the caller, M [REDACTED] K [REDACTED], identified himself as a shipping and receiving agent for [REDACTED] located at [REDACTED]. K [REDACTED], related that while at work he had opened a package that had been returned as undeliverable by the United Parcel Service (UPS). In the parcel he had discovered, among other things, several baggies of what appeared to be marijuana.

According to K [REDACTED], a greeting card in the box contained the handwritten notation that it had been sent by "L [REDACTED], Billy, and kids". K [REDACTED] reported that he believed that "Billy" was William Branish, Jr., a Philadelphia Police Officer who worked part-time at [REDACTED], was married to a woman named "L [REDACTED]", and had children. K [REDACTED] advised that he had immediately shown the box and its contents to officer manager R [REDACTED] T [REDACTED], who had taken custody of the box.

Sgt. Erickson arranged for K [REDACTED] to meet him at the [REDACTED] facility that same day, to unlock the building. Several other Internal Affairs Officers were present, as was "Jo-Jo" a drug-sniffing K-9 dog, who quickly located the box in question, on a shelf in a bathroom. The drug dog had a positive reaction to the box, indicating the presence of drugs.

Erickson then obtained a Search and Seizure Warrant for the box³, and inventoried its contents, which included six heat-sealed packets, approximately one inch by one inch, of a green leafy substance, which were inside a pill bottle, which had been placed inside four nested zip-lock plastic bags. A field test indicated that the green leafy substance was marijuana, a result later confirmed by lab testing.⁴

Also in the box was a holiday greeting card and a \$50 bill. The handwriting on the greeting card read, "*Stay warm bud, here's some smoke and a fifty to put some food in your belly. Love L [REDACTED] Billy & Kids*" (sic).

Sgt. Erickson subsequently obtained from [REDACTED]'s Office Manager R [REDACTED] T [REDACTED] a handwritten sheet of paper with the names, addresses, and weights, corresponding to three packages on a UPS shipping invoice. This handwritten note was evidently addressed to M [REDACTED] K [REDACTED], and stated, "*M [REDACTED] can you send these for me on Monday. Thank You. If you have any questions call [REDACTED] Billy*" (sic). Office Manager T [REDACTED] confirmed to Sgt. Erickson the story of the opening of the returned parcel, and the discovery of the pill bottle containing the plastic baggies of marijuana.

The handwriting on this note, requesting that the parcels be shipped, was later compared by a Police Forensic Documents Examiner with 25 known samples of Officer Branish's handwriting, and determined to be a match. Additionally, the phone number on the note was found to be a Verizon number assigned to Officer Branish. The police laboratory was unable to obtain any usable fingerprints from the parcel, the zip-lock bags, or the pill bottle.

³ See Exhibit C-4, Received into evidence.

⁴ See Exhibit C-8, Received into evidence.

Sgt. Erickson also investigated the circumstances surrounding the shipping of the box in question, and its return to [REDACTED]. The UPS tracking information disclosed that the box had been addressed to a Post Office Box in Cape May County, New Jersey, but had been returned as undeliverable due to the fact that UPS delivers only to physical addresses, not PO boxes. The UPS tracking information further disclosed that the box had been returned by UPS at 2:42 PM on the day that Internal Affairs had first been contacted by M [REDACTED] K [REDACTED]⁵

Based on all of the above, Sgt. Erickson obtained a warrant for Officer Branish's arrest, on the charge of Simple Possession of a controlled substance, and Possession With Intent to Deliver.

Approximately 9 months later, on September 20, 2016, Officer Branish was summoned to Internal Affairs headquarters for an investigatory interview conducted by Sgt. Erickson, who was accompanied by three other IAD officials. Branish was represented by both FOP Vice President John McCready and by Attorney Danielle Nitti.

Officer Branish was advised of his rights, and asserted his right to remain silent. At the conclusion of the interview, Branish was advised that he was suspended for 30 days with intent to discharge, and was being administratively charged with a violation of the Police Department Administrative Code, Section 1-026-10, *conduct unbecoming*, in addition to the various criminal charges.

The Fraternal Order of Police filed the instant grievance that same day, protesting Branish's discharge, and seeking that he be made whole.

M [REDACTED] K [REDACTED], the shipping clerk at [REDACTED], testified voluntarily, and without being subpoenaed. K [REDACTED] does not hold the police in high regard, due to the fact that his son, [REDACTED], has had several encounters with the police which K [REDACTED] viewed as harassment. Further, K [REDACTED] testified that

he had observed several instances that led him to conclude that Branish was a “dirty cop.” According to K [REDACTED], Branish had brought knives and a Taser, which he had confiscated while on police duty, into the [REDACTED] workplace, and sold them to co-workers.

For this reason, when K [REDACTED] discovered the marijuana in the returned parcel which had been shipped at the request of the Grievant, he felt strongly that the matter of what he described as a “crooked cop” should be reported to police Internal Affairs, and he took the initiative to do so. K [REDACTED] specifically denied that he planted the marijuana in the returned parcel.

Philadelphia Police Commissioner Richard Ross testified credibly at hearing as to his reasons for imposing discharge as the discipline for the Grievant’s actions, and also his rationale for declining to send the issue of discipline to the Police Board of Inquiry. According to Commissioner Ross, *“...in my view, that the conduct was so grave and egregious, given the responsibilities of a sworn police officer in the Commonwealth of Pennsylvania, that it just warranted direct action from me. It didn't require the need to send it before a Board because it was pretty clear-cut, as I could see it and determine it, and that's why I made that ruling.”*⁶

The Grievant’s Defense:

At the hearing before me, former Officer Branish and his wife, L [REDACTED], both testified as to the circumstances which led to Grievant Branish’s termination.

L [REDACTED] B [REDACTED] asserts that she prepared a number of Christmas parcels which her husband, Grievant William Branish, was to ship from [REDACTED], where he had permission to use the company’s UPS account for personal business. Ms. B [REDACTED] claimed that she prepared a box containing a Christmas card with a handwritten

⁵ See Exhibit C-11, received into evidence.

⁶ See Official Transcript, Page 25.

note, a \$50 bill, and some cigarettes and a few cigars, addressed to a family friend in Cape May, New Jersey. This family friend looked after the family's travel trailer, which was located at the shore. Ms. B [REDACTED] denied including marijuana in the parcel, and claimed that the reference to having a "smoke" on the greeting card was a reference to the included tobacco products.

William Branish testified in his own defense. Branish had been a police officer for 16 years prior to his termination, and had worked in the 265h District the entire time. Branish admits that the note contained in the package was his handwriting, but asserts that he had no independent knowledge of what was in the parcel that his wife had prepared, and which he arranged to be shipped. Branish did not deny shipping the parcel in question, but asserted that he had no knowledge of any marijuana contained therein.

The Pre-Trial Diversion:

Following his arrest and discharge, Officer Branish was accepted into the Accelerated Rehabilitative Disposition Program (ARD), which is administered by the Adult Probation and Parole Department of the Philadelphia Court of Common Pleas. Evidently, Branish complied with all of the terms of the program. By letter dated April 12, 2017, Branish was advised that he was eligible to petition the Court for expungement of his record.⁷

Analysis and Discussion

As stated in the introduction of this Award, the issue to be decided herein is whether the City violated the terms of the collective bargaining agreement by discharging Police Officer Branish.

⁷ See **Exhibit U-3**, received into evidence.

In the past, I have on occasion expressed concerned as to the adequacy of certain investigations conducted by the Internal Affairs Division of the Philadelphia Police Department. This time, however, the IAD appears to have done an exemplary job of investigating the circumstances surrounding the shipment of the mystery box, and Officer Branish's potential involvement therein.

The evidence as presented at hearing allows for only two possible scenarios: Either Officer Branish was criminally involved in shipping a package which contained marijuana, or some other party removed the tobacco products from the parcel somewhere during its travels, and replaced those tobacco products with packets of marijuana.

There is no question as to who packed the parcel for shipment, as Ms. E [REDACTED] admits doing so. Nor is there any issue as to who requested that the parcel be sent via UPS, given the written directions left by the Grievant. There is no evidence that the parcel was tampered with or pilfered in transit.

Thus, the only scenario which would exculpate the Grievant is that someone removed the tobacco products from the parcel and substituted the marijuana, during a short window period between the time the parcel was returned by UPS and before it was turned over to Office Manager R [REDACTED] T [REDACTED]. However, there is no evidence whatsoever to support this theory, other than an unsupported suggestion by Counsel for the Grievant.

In the absence of any real evidence that Shipping Clerk M [REDACTED] K [REDACTED], or someone else, tampered with the parcel and essentially tried to frame the Grievant, I reject such a theory. While K [REDACTED] clearly has a "bone to pick" with the police, it simply defies logic that he, or anyone else, would have had the motive, the presence of mind, and the opportunity to remove the lawful tobacco products, and replace them with marijuana. The perpetrator would have had to anticipate such an opportunity and be fully prepared. During the fifty minutes between the return of the package by UPS and the departure of K [REDACTED] from work, the marijuana would of had to be available in the

workplace, pre-packaged for retail sale, and securely quadruple-bagged to thwart detection.

I am especially struck by the fact that the \$50 bill was still in the parcel when Shipping Clerk K[REDACTED] turned it over to Office Manager T[REDACTED]. Leaving the \$50 bill behind is inconsistent with the deviousness of removing the tobacco products and replacing them with the incriminating marijuana

The burden of proof in discharge cases has previously been determined by Arbitrators Thomas G. McConnell, Jr. and Alan Symonette as being to a “*beyond a reasonable doubt*” standard. *FOP, Lodge 5 and the City of Philadelphia (Clarke)*, AAA Case No. 14 390 1611 06; *FOP, Lodge 5 and the City of Philadelphia (Kurowski)*, AAA Case No. 14 390 1372 98. In the past, I have utilized this “reasonable doubt” standard, and it is my intention to apply the “*beyond a reasonable doubt*” standard in the instant case.

Black’s Law Dictionary 161 (6th ed. 1990) defines “beyond a reasonable doubt” as “...fully satisfied, entirely convinced, satisfied to a moral certainty. This phrase is the equivalent of the words *clear, precise, and indubitable*.”

In the instant case, I have no doubt whatsoever that the City has established that the Grievant, Officer Branish, violated Departmental Policy Directive Section 1-026-10, conduct unbecoming, by engaging in misdemeanor conduct which carries the potential for a sentence of more than one year. The fact that Branish was accepted into the ARD deferral program and is currently eligible to have his arrest expunged is immaterial to the disposition of the matter before me. The only issue before me is whether the Grievant engaged in misconduct warranting discharge.

Certain serious acts of misconduct, such as theft, striking a supervisor, serious safety violations, or gross insubordination warrant immediate discharge, without any interim steps. Possessing and distributing controlled substances also is the sort of conduct which is simply unacceptable, especially for a police officer.

The City herein argues that Branish's misconduct, i.e. possessing and distributing marijuana, is a felony or misdemeanor carrying a potential sentence of more than one year, the punishment for which is immediate discharge.

Branish's actions clearly appear to be a violation of the US Crime Code, 21 U.S.C.A. Section 841(a) which makes it unlawful for a person to "*manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance...*" Under the terms of the labor agreement, such misconduct is subject to summary discharge, which was precisely the discipline imposed by the Police Commissioner in the instant matter. In fact, the Police Commissioner concluded that the case against Branish was so open and shut that he imposed this discipline without first referring the matter to the Police Board of Inquiry.

Discharge is the most extreme industrial penalty, and has been referred to as "industrial capital punishment", or more recently as the equivalent of "permanent exile".⁸ Discharge is sometimes part of a disciplinary continuum, but that analysis is not applicable in a case like this, where discharge was the first step in the disciplinary progression, and not the last step.

Discharge has the effect of severing an employee where there is no longer any hope of rehabilitation. The sole purpose of discharge is to unburden the Employer from an individual whose conduct has become intolerable. Discharge abolishes the employment relationship, while a disciplinary suspension is designed to improve it.⁹

In the instant case, I am convinced that the evidence is more than sufficient to establish that Branish, whether with or without his wife's involvement, violated departmental policy, specifically Section 1-026-10, and is deserving of discharge. The Greivant has not requested leniency, nor is any leniency warranted in this matter; as the

⁸ Schroeder, "*Discharge: Is it Industrial Capital Punishment?*" 37 Arb. J. No. 4, 65 (1982).

⁹ *Red Cross Blood Serv.*, 90 LA 393, 397 (Dworkin, 1988).

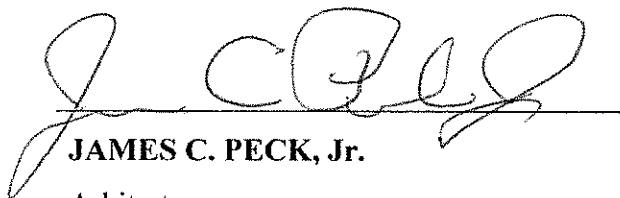
Grievant has not taken responsibility for his actions, and has instead attempted to deflect his culpability.

Given the facts as presented at the hearing before me, I have concluded that the discharge of Grievant Branish is warranted.

AWARD

Based on the evidence, and the discussion as set forth above, the undersigned makes the following award:

The grievance alleging that the Police Department violated the collective bargaining agreement by discharging Police Officer William E. Branish is hereby DENIED.

A handwritten signature in black ink, appearing to read "J. C. Peck, Jr.", is written over a horizontal line.

JAMES C. PECK, Jr.

Arbitrator

Media, Pennsylvania

July 14, 2017